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January 6, 2010

The Honorable Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South
Carolina, Complainant/Petitioner v. Image Access, Inc., d/b/a New Phone,
Defendant/Respondent
Docket No. 2010-

Dear Mr. Terreni:

Enclosed for filing is AT&T South Carolina's Complaint and Petition for Relief in the
above-referenced matter.

By copy of this letter, I am serving all parties of record with a copy of this pleading as
indicated on the attached Certificate of Service.

Sincerely,

A handwritten signature in black ink that reads "Patrick W. Turner". The signature is written in a cursive, flowing style.

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
766115

I. BACKGROUND AND SUMMARY OF COMPLAINT AND PETITION

New Phone owes AT&T South Carolina a past-due and unpaid balance for telecommunications services AT&T South Carolina provided it for resale under the terms and conditions of applicable interconnection agreement(s). As of November 9, 2009, this past-due and unpaid balance totals, in the aggregate, more than \$1 million in the State of South Carolina.³ To the extent that New Phone has disputed AT&T South Carolina's bills, AT&T South Carolina has denied those disputes as required by its interconnection agreement(s) with New Phone. New Phone, however, has declined to pay AT&T South Carolina the amounts associated with these denied disputes. A substantial amount of this past-due and unpaid balance is the result of New Phone's withholding payments to AT&T South Carolina for one or both of the following reasons:⁴ (1) New Phone erroneously asserts that AT&T South Carolina cannot apply the resale discount approved by this Commission to the cashback component of various promotional offers that AT&T South Carolina makes available for resale;⁵ and (2) New Phone erroneously asserts that

³ As of November 9, 2009, New Phone's unpaid and past-due balance is over \$3.9 million across the nine southeastern states that comprised the former BellSouth's ILEC operating territory.

⁴ A more detailed description of New Phone's assertions, and a brief explanation of why they are erroneous, is set forth in Section IV. below.

⁵ For one-time "cash back" promotions, AT&T contends that resellers should receive less than the face amount of the promotion minus the wholesale discount because such valuation does not reflect the true economic value of the promotion on retail rates. Among other things, it does not consider the redemption rate, the in-serve life of the subject customer, or the net present value of a one-time upfront payment associated with the promotion. Recently, AT&T implemented a new methodology aimed at providing the true economic value of the promotion to resellers. Several resellers are challenging the methodology in other proceedings, but that issue is not before the Commission in this docket because AT&T South Carolina is not seeking any amounts billed under this new methodology in this docket.

AT&T South Carolina's customer referral marketing promotions (such as the "word-of-mouth" promotion) are subject to resale.

The interconnection agreement(s) between AT&T South Carolina and New Phone provide that disputes like these are to be resolved in the first instance by this Commission. AT&T South Carolina, therefore, respectfully requests that the Commission resolve the outstanding disputes, determine the amount that New Phone owes AT&T South Carolina under the parties' interconnection agreement(s), and require New Phone to pay that amount to AT&T South Carolina.

II. PARTIES

1. AT&T South Carolina is a corporation organized under the laws of the state of Georgia. AT&T South Carolina is an incumbent local exchange carrier ("ILEC") as that term is defined by both federal⁶ and state⁷ law, and it is a "telephone utility" as that term is defined by state law.⁸

2. The full name and address of the authorized representative for AT&T South Carolina in this proceeding is:

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3. New Phone is organized under the laws of the state of Louisiana. New Phone is a "telephone utility" as that term is defined by state law, and it is authorized to

⁶ See, e.g., 47 U.S.C. §251(h)(1).

⁷ See S.C. Code Ann. §58-9-10(11).

⁸ See *Id.*, §58-9-10(6).

provide resold local exchange telecommunications services within the State of South Carolina.

III. NEW PHONE'S BREACH OF ITS INTERCONNECTION AGREEMENT(S)

4. In 2002, AT&T South Carolina and New Phone entered into a negotiated interconnection agreement (the "New Phone 2002 agreement") in which AT&T South Carolina agreed, among other things, to offer various telecommunications services for resale to New Phone at specified wholesale rates and subject to specified terms and conditions. A copy of the New Phone 2002 agreement is on a CD attached hereto as Exhibit A.⁹

5. In 2006, AT&T South Carolina and New Phone entered into a negotiated interconnection agreement (the "New Phone 2006 agreement") in which AT&T South Carolina agreed, among other things, to offer various telecommunications services for resale to New Phone at specified wholesale rates and subject to specified terms and conditions. A copy of the New Phone 2006 agreement is on a CD attached hereto as Exhibit A.

6. As of November 9, 2009, New Phone owes a past due and unpaid balance to AT&T South Carolina in the amount of \$1,092,740.30 (the "Past Due Balance"). The Past Due Balance represents the amounts AT&T South Carolina billed New Phone for telecommunications services provided to New Phone in South Carolina pursuant to the parties' interconnection agreement(s) less: payments made by New Phone; and credits provided by AT&T South Carolina to New Phone in connection with valid disputes and approved promotional credit requests submitted by New Phone as of November 9, 2009.

⁹ AT&T will make copies of this CD available to the parties upon request.

7. The Past Due Balance does not include any amounts related to disputes or promotional credit requests submitted by New Phone, but not yet reviewed by AT&T South Carolina.

8. To the extent that the Past Due Balance includes any charges on AT&T South Carolina's invoices that New Phone has disputed, AT&T South Carolina has denied those disputes as required by its interconnection agreement(s) with New Phone.

9. New Phone has breached the New Phone 2002 agreement and/or the New Phone 2006 agreement by refusing to pay amounts that are due and owing to AT&T under those Agreements.

IV. NEW PHONE'S ERRONEOUS REASONS FOR NONPAYMENT

10. As noted above, a substantial amount of New Phone's unpaid balance is the result of New Phone's withholding payments to AT&T South Carolina for one or both of the following reasons.

A. Application of the resale discount to the "cashback" component of promotional offerings.

11. New Phone asserts that AT&T South Carolina cannot apply the resale discount approved by this Commission to the cashback component of various promotional offerings that AT&T South Carolina makes available for resale. Assume, for example, AT&T South Carolina's retail promotional offering provides a retail customer who purchases Telecommunications Service A under certain conditions a coupon that can be redeemed for a \$50 check. When New Phone resells that promotional offering to qualifying end users and submits to AT&T South Carolina an appropriate promotional credit request, AT&T South Carolina provides New Phone a bill credit of \$42.60 (\$50 less the 14.8% resale discount established by this Commission). New

Phone, however, erroneously contends that it is entitled to a bill credit for the full \$50 “face value” of the cashback amount.

12. There is no basis in logic or law for New Phone’s assertions. If AT&T South Carolina were to reduce the retail price of a telecommunications service by \$50 in a given month (say from \$200 to \$150), New Phone would not receive the full \$50 “face value” of the reduction when it purchased that service for resale. Instead, New Phone would receive a \$42.60 reduction – the \$50 face value of the reduction less the 14.8% avoided cost discount established by the Commission.¹⁰ New Phone clearly should not receive a greater wholesale reduction merely because the retail reduction takes the form of a “cashback” offer rather than a price reduction.

13. The federal Act expressly contemplates that when an incumbent LEC resells services under §251(c)(4), “a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.” 47 U.S.C. § 252(c)(3). Using this “costs avoided” standard, this Commission determined a state-wide percentage discount from the retail rate that is used to determine the wholesale rate at which the incumbent LEC, such as AT&T South Carolina, is to sell its services to CLECs

¹⁰ When the retail price of the service was \$200, New Phone paid AT&T South Carolina \$170.40 (\$200 less the 14.8% resale discount) when it purchased the service for resale. When the retail price of the service is reduced to \$150, New Phone pays AT&T South Carolina \$127.80 (\$150 less the 14.8% resale discount) when it purchases the service for resale. In other words, a \$50 reduction in the retail price of the service results in a \$42.60 reduction in the price New Phone pays for the service (from \$170.40 to \$127.80), which is the \$50 “face value” of the reduction less the 14.8% resale discount.

for resale. Far from being inappropriate, subtracting the wholesale discount from the face value of the promotion is exactly what is contemplated by the federal Act.

B. Customer Referral Marketing Promotions.

14. New Phone asserts that AT&T South Carolina's customer referral marketing promotions (such as the "word-of-mouth" promotion) are subject to resale. Assume, for example, that AT&T gives retail customers who qualify a \$50 bill credit when they refer others who purchase AT&T services. New Phone contends that it is entitled to resell this customer referral marketing promotion and that it therefore is entitled to a \$50 bill credit when one of New Phone's end users refers others who purchase services from New Phone.

15. Subject to certain conditions and limitations, AT&T South Carolina is required "to offer for resale at wholesale rates any *telecommunications service* that [it] provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. §251(c)(4)(A)(emphasis added). Customer referral marketing promotions, however, are not telecommunications services that are subject to resale obligations. An end user does not receive any benefit under these promotions for purchasing telecommunications services from AT&T South Carolina. Instead, an end user receives benefits under these promotions only if he or she successfully markets AT&T South Carolina's services to others who then purchase services from AT&T South Carolina. New Phone obviously is free to give similar benefits to its end users who successfully market its services to others, but it is not entitled to have AT&T South Carolina finance any such marketing programs that New Phone may employ.

16. The federal Act makes it clear that CLECs must finance their own marketing programs when it directs State commissions to “determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, *excluding the portion thereof attributable to any marketing . . . costs that will be avoided by the local exchange carrier.*” 47 U.S.C. §252(d)(3). Accordingly, the resale discount rate that this Commission established (and that is incorporated in the New Phone 2002 agreement and the New Phone 2006 agreement) already excludes the costs of customer referral marketing promotions like the “word of mouth” promotion. To go further and also require AT&T South Carolina to give New Phone additional promotional credits for these customer referral marketing promotions would impermissibly force AT&T South Carolina to double-count its marketing expenses -- first in the wholesale rate, and again in the promotional credit.

V. JURISDICTION

17. The Commission has jurisdiction to interpret and enforce the terms of the interconnection agreement(s) at issue in this docket. The 1996 Act expressly authorizes state commissions to mediate interconnection agreement negotiations,¹¹ arbitrate interconnection agreements,¹² and approve or reject interconnection agreements.¹³ In addition, the courts have held that section 252 implicitly authorizes state commissions to interpret and enforce the interconnection agreements they approve.¹⁴

¹¹ 47 U.S.C. § 252(a)(2)

¹² *Id.* § 252(b)

¹³ *Id.* § 252(e)

¹⁴ See, e.g., *Bell Atl. Md., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 304 (4th Cir. 2001) (“The critical question is not whether State commissions have authority to interpret and enforce interconnection agreements – we believe they do”), *vacated on other grounds in Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 65 (2002). See also

VI. REQUEST FOR RELIEF

WHEREFORE, AT&T South Carolina respectfully requests that the Commission:

(1) Serve a copy of this Complaint and Petition upon New Phone pursuant to S.C. Code Ann. §58-9-1090 and require New Phone to answer the Complaint and Petition;

(2) Find that New Phone has breached the New Phone 2002 agreement and/or the New Phone 2006 agreement by wrongfully withholding amounts due and payable to AT&T South Carolina for services provided in accordance with the parties' interconnection agreement(s);

(3) Find that AT&T South Carolina has been financially harmed as a direct result of New Phone's breach;

(4) Find that New Phone is liable to AT&T South Carolina for all amounts wrongfully withheld by it, including without limitation late payment charges and interest;

(5) Require New Phone to pay AT&T South Carolina all amounts wrongfully withheld by it, including without limitation late payment charges and interest; and

(6) Grant AT&T South Carolina such additional relief as the Commission may deem just and proper.

Core Commc'ns v. Verizon Pennsylvania, Inc., 493 F.3d 333, 342 n.7 (3rd Cir. 2007) (“[E]very federal appellate court to consider the issue has determined or assumed that state commissions have authority to hear interpretation and enforcement actions regarding approved interconnection agreements”)

Respectfully submitted this 6th day of January, 2010.

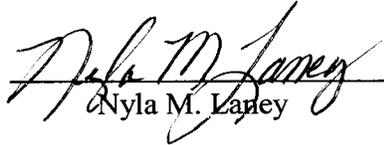
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